Promotional and Operational Issues in Marketing

Chapter 19

Management Contexts, Relevant Laws, and Cases

Management Context	*Major Legal Issues*	*Relevant Law*	*Illustrative Cases*
Advertising development and placement	Deceptive trade practices regulations	FTCA, State DTPA	
	Other regulations or limitations of commercial speech or advertising activities	First Amendment free speech	*Central Hudson, Albarado, Nike*
	False advertising	False or deceptive advertising	*Stokely-Van Camp, Baden Sports, MillerCoors LLC*
Celebrity endorsements	Scope of the right of publicity	Unfair competition law and Tort of Invasion of Privacy	*Haelan, Zacchini, Hart, Keller, O'Bannon, C.B.C.*
	Liability of celebrity endorsers for false product claims	FTCA, 16 CFR § 255.0	*FTC v. Garvey*
Competitors' business practices	Ambush marketing and misappropriation of goodwill	Common law misappropriation	*NHL v. Pepsi, NFL v. Delaware*
		Lanham Act – trademark infringement	*NCAA v. Coors*
Sales, ticket sales	Consumer contract rights	Uniform Commercial Code FTC and state sales regulations	*Oshinsky*
Developing partnerships and business relationships	Negotiating and drafting effective contracts	Contract and agency law	
	Exclusivity in contracts	Price fixing	*American Needle, Dang*
Interacting with and through the media	Broadcasting agreements/Liability for disclosure of private information	Digital Millennium Copyright Act FERPA; Tort of Invasion of Privacy	*Andrews*
	Defamation	Tort of Defamation	*Woy, Montefusco, Fine, McGraw, Knievel, Curtis Publishing*

Legal Issues and Marketing

Legal issues often parallel elements of the traditional marketing mix: promotion, pricing, and public relations

- Promotion of products and services through advertising
- Use of sales promotions and contests
- Pricing and ticket sales
- Media relations & broadcasting agreements

Consumer Protection & Marketing Activities

- Our Marketing efforts naturally target Consumers
- Consumer: Any individual who purchases goods or services for personal or household consumption
- **Federal Trade Commission**:
  - Regulates advertising and business practices to protect consumers
- State Consumer protection laws
  - Regulates sales promotions, sweepstakes, advertising, and other business practices

Consumer Protection and the First Amendment

- Many Marketing Activities, and particularly Advertising involve "commercial speech"
  - Speech that does no more than propose a commercial transaction (e.g., advertising).
- Commercial Speech is entitled to constitutional protection under the First Amendment – but protection is limited
  - First Amendment protects only commercial speech that is **truthful and not misleading**.
- Preliminary question can be whether the speech is in fact commercial speech and can be regulated by the FTC

Elements Used to Categorize Commercial Speech

- Speaker
- Intended audience
- Factual content of message

Sport Marketing Activities

- Advertising and Promotions
- Conducting Sales Promotions
- Pricing, Ticket Sales, and Strategic Partners
- Media Relations and Broadcasting Agreements

Advertising and Promotions

- Advertising and federal law (the Lanham Act)
  - Prohibits misrepresentations in commercial advertising and promotions but does not define commercial advertising and promotions specifically.
  - Courts hold determination is based on whether advertising is part of an organized campaign to penetrate a relevant market
  - Advertisements can also be deceptive if they contain false or exaggerated claims

False Advertising

- Deception
- Implied claims
- Sales puffing
- Incomplete comparisons
- Exaggeration

False Advertising vs. Deceptive Advertising

Elements of False Advertising under the Lanham Act

- A false statement of fact by the defendant in a commercial advertisement about its own or another's product;
- The statement actually deceived or has the tendency to deceive a substantial segment of its audience;
- The deception is material, in that it is likely to influence purchasing decision;
- The defendant caused its false statement to enter interstate commerce; and
- The plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales or a lessening of goodwill associated with its products.

Deceptive Advertising

- Defined as: advertisement containing a statement or omission that is misleading
- Might not be objectively false, but is likely to mislead a consumer in a material way
- Can be insinuation or implied

How to Evaluate a False or Deceptive Advertising Claim

Is the representation, omission or practice likely to mislead the consumer?

Use the perspective of a consumer acting reasonably in the circumstances.

Is the representation, omission, or practice a material one (likely to influence the consumer's purchase decision)?

Legal Review

- Can you think of a time when you were taken in by false advertising? How did that deception make you feel?
- Did you blame the advertising firm, or did you blame the company itself?
- If you blamed the company, did you continue to be loyal to it?

Advertising — Special Offers

- Bait advertising
- Bargain offers
- Comparative advertising
  - (e.g., Beer and Pizza!!)

Athlete Endorsements

FTC Celebrity Endorsement Guidelines

Does athlete in fact use/prefer the product or service

Emphasis on Social Media

Conducting Sales Promotions

Sweepstakes and contests

Ambush marketing

Some Prominent Ambush Marketing Campaigns

- 1984 Los Angeles Olympics: Kodak film company sponsors TV broadcasts of the Games as well as the U.S. track team, Fuji is an official sponsor.
- 1992 Barcelona Olympics: Nike sponsors press conferences with the U.S. basketball team despite Reebok being the official sponsor.
- 1996 Atlanta Olympics: Nike's Atlanta ambush is still seen as the ambush of all ambushes. Saving the $50 million cost of an official Olympic sponsorship, Nike plasters the city with billboards and hands out "swoosh" banners to wave during the competitions.
- 2000 Sydney Olympics: Qantas Airlines' slogan, "The Spirit of Australia," sounds strikingly similar to the Games' slogan, "Share the Spirit."
- 2002 Salt Lake City Winter Olympics: Anheuser-Busch pays more than $50 million to become an official Olympic sponsor. Schirf Brewery, a small local company, rather ingeniously (and apparently legally) marks its delivery trucks with "Wasatch Beers. The Unofficial Beer."
- 2007 U.S. Open: The Arizona Beverage Company hands out free samples of their sports drink to fans around the event facility. Gatorade is the official sports drink sponsor of the event.
- Euro 2008: Heineken passes out large green hats to fans buying their beer prior to a Dutch soccer match.
- 2010 FIFA World Cup: Bavaria Beer attempted to ambush the official sponsor Budweiser by sending in 36 blonde models clad in orange mini-dresses to capture the attention of the TV viewing audience during the Denmark/Netherlands match.
- 2012 London Olympics: Beats Electronics' staff "bumped" into Olympic athletes and gave them free headphones, which were seen prominently on many athletes prior to and during competition.
- 2012 London Olympics: Nike's "Find Your Greatness" campaign filmed athletes running, jumping, and diving alongside the word "London" in towns located in the United States, Norway, Jamaica, and Nigeria.
- 2014 FIFA World Cup: Following Brazil's match versus Cameroon, famed Brazilian striker, Neymar, was photographed shirtless with his boxer shorts showing the unofficial Blue Man boxer's.
- 2016 Rio Olympics: Apple sold country-specific bands for iWatches ahead of the Games and Michael Phelps was seen wearing Beats headphones before races.
- 2018 NBA All-Star Game: adidas engaged in ambush marketing during the league's marquee event, when it rented an entire square block in Los Angeles and hosted concerts featuring top performers, fashion shows, pop up shops, a museum, and more.

Pricing, Ticket Sales, and Interactions with Partners

Pricing activities

- Price fixing agreements
- Exclusive sponsorship or licensing agreements

Contracts and ticket sales

- Ticketholder lawsuits
- PSL's

Strategic partners

- Researching potential partners
- Managing disputes
- Exit strategies

Interactions with Strategic Partners

Example relationships:

- Corporate sponsorships
- Facility naming rights
- Co-branding
- Cross-promotion
- Integration of social media

Precautions:

- Research your potential partner
- Plan an exit strategy
- Preserve intellectual property

Competitive Advantage Strategies
Communications and Advertising

- Recognize that communications with customers about competitors may have legal consequences.
- Verify the accuracy of statements made in advertising.
- Make sure you have the consent of any person whose likeness is being used in an advertisement or promotion.
- Make sure athletes who are endorsers, who also use social media, disclose sponsorship relationships.

(continued)

Competitive Strategies, continued

- Build as many protections as possible into sponsorship and broadcasting agreements, to combat ambush marketing.
- Actively monitor advertising practices of competitors and notify them of possible illegal or unethical practices.
- Understand FTC regulations regarding language in advertisements that include discounts or other incentive advertising.

Media and Broadcast Partners

Media relations personnel:

Sport information directors, publicity directors, or media relations directors

Media information about an organization:

Press kits, press releases, press conferences, media guides, stat sheets, fact sheets, public announcements, social media, and websites.

Broadcast Agreements—
Issues to considering when negotiating

Quantification of coverage	Scope of coverage and revenues	Mode of transmission and medium of distribution
Access to the event	Cancellation of the event	Protection against ambush marketing

Defamation and Privacy Rights

- The expectation that confidential information disclosed in a private place will not be disclosed to third parties.
- Intentional or inadvertent disclosures by/to the media can expose organizations to defamation or invasion of privacy actions
  - Statement about reasons for terminating a coach
  - Statements published in media about an athlete's private life
  - Statements made on social media

Defamation

- **Purpose:** Protect a person from false statements that are damaging to their reputation
- **Elements of Defamation: A defamatory act is**
  - A false statement
  - Published to a third party
  - Involving **some degree of fault** or negligence on part of the publisher
  - Causing actual damage
- **Slander:** Spoken communication
- **Libel:** Written communication

Actual Malice Standard

Public officials, public figures, and limited purpose public figures

Public Officials	For a public official to recover for defamation they must prove Actual Malice (statement made with knowledge it was false or with reckless disregard of whether it was false or not)
	People should be free to criticize public officials to assure free exchange of ideas
Public Figures	One who has gained notoriety from their achievements or seeks public attention through vigor and success
	Actual malice also required for a public figure to recover for defamation
Limited purpose public figure	One who has local recognition or media coverage on a local level drawn into or voluntarily injected into public controversy
	Actual malice also required to recover for defamation but only with regard to their involvement in the public controversy and if statements relate to the public controversy

Actual Malice and Athletes/Coaches

Professional athletes, coaches must prove that defamatory statements were made with "actual malice."
College athletes likely to move into this category as NIL opportunities expand

They have voluntarily placed themselves in the public eye.

They are exposed to greater public scrutiny.

They have greater access to the media and can better defend themselves.

Invasion of Privacy

- Four types of common law privacy rights:
  - Unreasonable intrusion
  - Appropriation of a person's name or likeness (now mostly blended into Publicity Rights)
  - Publication of private facts
  - Publication that places person in false light

Emerging Privacy Issue: Sport Analytics and Data Privacy

Competitive Advantage Strategies
Consumer Interactions & Marketing

- Document strategic alliances with memo of understanding to define parameters and interests.
- Involve lawyers in drafts of agreements, negotiations, and research.
- Verify information provided to the media.
- Avoid disclosures about personnel, employment, or status of coaches.
- Allow a resigning coach to make an official announcement themself.
- Be aware of limitations on the type of information that can be disclosed about student-athletes.
- Have a data protection system in place.